

MARY C. ALBERT
ATTORNEY-AT-LAW

SWIDLER
&
BERLIN
CHARTERED

DIRECT DIAL
(202)424-7724

DOCKET FILE COPY ORIGINAL

RECEIVED

May 1, 1998

MAY - 1 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

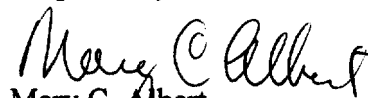
Re: Petition for Declaratory Ruling Or, In the Alternative, For
Rulemaking on Defining Certain Incumbent LEC Affiliates As
Successors, Assigns or Comparable Carriers Under Section 251(h)
of the Communications Act, CC Docket No. 98-84

98-39

Dear Ms. Salas:

Enclosed for filing in the above-referenced docket are an original and 12 copies of KMC
Telecom Inc.'s Comments in support of the Petition.

Respectfully submitted,



Mary C. Albert
Counsel for KMC Telecom Inc.

Encl.

RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAY - 1 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Competitive Telecommunications Association,
Florida Competitive Carriers Association,
and Southeastern Competitive Carriers Association

Petition on Defining Certain Incumbent LEC Affiliates
As Successors, Assigns, or Comparable Carriers
Under Section 251(h) of the Communications Act

)
) CC Docket No. 98-³⁹~~84~~
)
)
)
)
)

**KMC TELECOM INC.'S COMMENTS IN SUPPORT
OF PETITION FOR DECLARATORY RULING OR,
IN THE ALTERNATIVE, FOR RULEMAKING**

KMC Telecom Inc., through counsel and pursuant to the Commission's April 1, 1998 Public Notice, DA 98-627, hereby submits its comments in support of the Petition for Declaratory Ruling Or, In The Alternative, For Rulemaking filed by the Competitive Telecommunications Association, Florida Competitive Carriers Association and Southeastern Competitive Carriers Association (collectively "Petitioners") on March 23, 1998.

INTRODUCTION

The Petitioners request that the Commission (1) issue a declaratory ruling that an incumbent local exchange carrier ("ILEC") affiliate that operates under the same or a similar brand name as the ILEC and provides wireline local exchange or exchange access service within the ILEC's territory will be considered a "successor" or "assign" of the ILEC within the meaning of Section 251(h)(1) and therefore subject to the requirements of Section 251(c); or (2) initiate a rulemaking for the purpose of considering a rule that establishes a rebuttable presumption that such an ILEC affiliate is a "comparable carrier" within the meaning of Section 251(h)(2) and therefore subject to the requirements of Section 251(c). KMC agrees with Petitioners that

Commission action is necessary to prevent the major ILECs -- the BOCs, GTE and Sprint/United -- from evading their Section 251(c) statutory obligations by establishing unregulated (or lightly regulated) affiliates to provide “competitive” local exchange services in their own service territories. An ILEC affiliate that is virtually indistinguishable from the ILEC itself and offers the same local exchange service as the ILEC does nothing to promote competition in the local telephone market. On the contrary, to the extent that the ILEC can use the affiliate to skirt its regulatory responsibilities, the development of competition will be thwarted.

As Petitioners point out, a number of ILECs have formed or are forming “competitive” local exchange carrier (“CLEC”) affiliates to provide service in the territories where the ILECs are already the dominant local carriers. The BellSouth situation cited by Petitioners dramatically demonstrates the potential for ILECs to use such CLEC affiliates to circumvent their statutory duties to make their networks and services available to other requesting carriers. BellSouth BSE, Inc., the BellSouth Telecommunications CLEC affiliate, intends to offer a variety of services, including local exchange, cellular, internet, video and long distance (when authorized). BellSouth BSE will obtain the services it markets on a resale basis from BellSouth Telecommunications (the ILEC) and other BellSouth affiliates (i.e., BellSouth Cellular, BellSouth.net, etc.). BellSouth BSE will be capitalized and funded by BellSouth Corporation, the common parent of the CLEC and ILEC; will use the BellSouth corporate name, logo and other indicia of corporate identity; and will be staffed by employees transferred from the ILEC. (Petition at 4-6.) Thus, an end user who becomes a customer of the BellSouth CLEC will receive

the exact same local telephone service that it receives from the BellSouth ILEC. The BellSouth CLEC, however, will not be subject to incumbent or dominant carrier regulation despite the fact that it is indistinguishable from the ILEC.

**INCUMBENTS SHOULD NOT BE ABLE TO AVOID
THEIR SECTION 251(c) DUTIES BY OFFERING
LOCAL EXCHANGE SERVICE THROUGH AN AFFILIATE**

The Commission has acknowledged the significant competitive advantages the major ILECs enjoy by virtue of their brand name recognition, ability to operate large mass-market focused local telephone companies, access to substantial financial resources and mass marketing capabilities. *Merger of NYNEX Corporation and Bell Atlantic Corporation*, File No. NSD-L-96-10, at ¶¶6, 10 (released August 14, 1997). An ILEC CLEC affiliate that uses the ILEC's trade name, is capitalized by the ILEC or its parent company and markets the ILEC's local exchange services in the ILEC's own service territory enjoys these same competitive advantages. Because the CLEC affiliate has all the advantages of the incumbent monopolist and will not in fact "compete" with the monopolist, according it the same treatment as other CLECs who have no market power would be a regulatory fiction.

Unless the Commission clarifies that such CLEC affiliates are subject to the same Section 251(c) obligations as the ILECs, either by deeming the CLEC affiliates to be "successors" or "assigns" of the ILECs or "comparable carriers" within the meaning of Section 251(h), ILECs will have the ability to evade their resale obligations simply by transferring customers to the CLEC. The entry of the CLEC into the ILEC's local exchange market will not increase the choice of carriers available to consumers. Where the CLEC simply resells the ILEC's local exchange services, the service the end user customer receives will be identical to

the service it received as a customer of the ILEC. By interposing the CLEC affiliate between the ILEC and the end user, however, the ILEC will be able to accomplish two very important objectives. First, the ILEC will have the flexibility to price the local exchange service it provides to certain end users more competitively because the CLEC affiliate will not be subject to rate regulation. Secondly, the ILEC will be able to protect its local exchange customer base from resale competition because the CLEC affiliate serving the end user will be under no statutory obligation to offer its services for resale at a wholesale discount.

Allowing ILECs to insulate segments of the local exchange market from competition through the use of such CLEC affiliates as resale agents would frustrate the intent of Congress in legislating resale as one of the three mechanisms for entry into the ILECs' monopoly markets. In prior decisions, the Commission consistently and appropriately has restrained the ability of ILECs to circumvent their resale obligations through creative marketing and sales tools. For example, in the *Local Competition Order*,¹ the Commission determined that ILECs could not avoid the resale requirements of Section 251(c)(4) by offering their services at perpetual promotional rates. 11 FCC Rcd at 15966. Similarly, in the BellSouth Section 271 decisions² the

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F. 3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) ("*Local Competition Order*").

² *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, CC Docket No. 97-231, at ¶¶64-69 (released February 4, 1998) ("*BellSouth Louisiana decision*"); *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, CC Docket No. 97-208, at ¶¶215-219 (released December 24, 1997) ("*BellSouth South Carolina decision*").

Commission ruled that BellSouth's failure to offer contract service arrangements ("CSAs") for resale at a wholesale discount violates Section 251(c)(4) and improperly impairs the use of resale as a vehicle for competitors to enter the local exchange market. The Commission recognized that BellSouth could simply convert customers to CSAs in order to evade the wholesale discount.

The concerns expressed by the Commission in these decisions are no less valid here. ILECs can use their CLEC affiliates to defeat competition and maintain their market share in a manner that Congress surely did not contemplate. By shifting their local exchange customers to CLEC affiliates that would offer the ILEC's retail services on a resold basis, ILECs can eviscerate the resale provisions of the Act. Although the customer would receive the identical service from both the ILEC and the CLEC affiliate, resellers effectively would be foreclosed from competing for the customers shifted to the CLEC affiliate unless the Commission holds that the CLEC affiliates are subject to the requirements of Section 251(c). *See BellSouth South Carolina* decision at ¶219 (allowing ILECs to set the wholesale discount for services that must be resold at a discount of zero would wholly invalidate the wholesale pricing obligation); *BellSouth Louisiana* decision at ¶68 (a BOC's failure to offer CSAs for resale at a discount impedes competition for large volume customers). Just as the Commission has held that there is no basis for creating a general exemption from the wholesale requirement for all promotional or discounted service offerings made by ILECs,³ it should also find that there is no basis for creating a general exemption from the wholesale requirement for local exchange offerings that are resold in an ILEC's own service territory by the ILEC's CLEC affiliate.

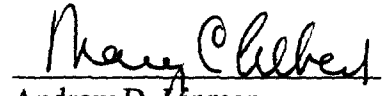
³ *Local Competition Order*, 11 FCC Rcd at 15970.

CONCLUSION

For the foregoing reasons and those stated by Petitioners, the Commission should find that an affiliate of a major ILEC that provides local exchange service in the ILEC's own service territory under the same or a similar name as the ILEC is subject to the requirements of Section 251(c), either as a successor or assign of the ILEC or as a comparable carrier within the meaning of Section 251(h).

May 1, 1998

Respectfully submitted,



Andrew D. Lipman

Mary C. Albert

SWIDLER & BERLIN, CHTD.

3000 K Street N.W., Suite 300

Washington, D.C. 20007

(202) 424-7500

Counsel for KMC Telecom Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May 1998, copies of the foregoing KMC Telecom Inc. Comments in Support of Petition For Declaratory Ruling, or, In the Alternative, For Rulemaking were hand delivered or sent by first-class mail, postage prepaid to the following:

David L. Sieradzki, Esq.
Hogan & Hartson, L.L.P.
555 - 13th Street N.W.
Washington, D.C. 20004

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street N.W., Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street N.W.
Washington, D.C. 20036



Mary C. Albert